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# Recent Efforts To Redirect Employer-Related Claims For Asbestos-Related Occupational Disease In Pennsylvania Back To The Administrative Arena

Under Pennsylvania law, occupational injury claims are excluded from the civil tort system and instead proceed through the employee's choice of two administrative bodies governed by the Workers' Compensation Board (the "Board"): the Occupational Disease Act ("ODA"), 77 P.S. §§ 1101, *et seq*., or the Workers' Compensation Act ("WCA"), 77 P.S. §§ 1, *et seq*. This allows occupational injury claims to be processed without the time and cost associated with litigation.

Injured employees are entitled to file a claim with both the WCA and the ODA but are ultimately only permitted to recover under one. Like a statute of limitations for civil matters, the WCA requires that all claims must be filed with 300 weeks of an employee's last date of exposure. Asbestos-related illness generally arises after a significant latency period; often, several decades elapse between an individual's exposure to asbestos and their diagnosis. Such injured party would not know he had a basis to file a claim for occupational disease until well past the 300-week limit mandated by the WCA. As a result, that employee is ultimately excluded from recovering under the WCA due to the time limit and precluded from a civil suit due to the WCA's exclusivity clause.

An exception was created when the Pennsylvania Supreme Court held that employees who develop asbestos-related lung diseases as a result of their employment are not bound by the WCA's exclusivity clause, finding that these do not fall with the Act's definition of disease. *Tooey v. AK Steel Corp*.[1] If an asbestos-related occupational disease manifests *outside* of the 300-week period proscribed by the WCA, the employee may pursue a civil claim sounding in tort against his employer. *Id*.

However, although *Tooey* created opportunity for claimants time-barred by the WCA, it does not address or eliminate the injured employee's ability to file a claim through the ODA. Although *Tooey* cut a path to recovery outside of the WCA, a plaintiff filing a claim pursuant to *Tooey* must still exhaust his administrative remedies. Just because the WCA is no longer available and *Tooey* presents an alternative, *Tooey* does not eliminate the injured employee's need to exhaust his administrative remedies through the WCA *or* ODA. Filing a civil suit outside of the WCA and pursuant to *Tooey* does not mean that an injured employee has properly exhausted his administrative remedy. Rather, that employee still has the potential for a claim under the ODA and that should be evaluated by the Board. Only if the ODA claim is denied, leaving Plaintiff with **no** remaining administrative remedy, could the *Tooey* exception be triggered.

Until recently, Pennsylvania courts declined to follow that reasoning. On March 24, 2021, an opinion was issued from the Western District of Pennsylvania in the matter of *Data v. Pennsylvania Power Company, et al*.,[2] staying claims against defendant Pennsylvania Power, plaintiff's former employer, until plaintiffs exhausted their administrative remedies through the ODA, despite the fact that plaintiffs had filed their civil suit pursuant to the *Tooey* exception.

The court in *Data* agreed that, "if Plaintiff has a cognizable claim under the ODA, then her common law tort claim … is barred." *Id*. The court declined to dismiss plaintiffs' claims as to Pennsylvania Power, instead staying the proceedings as to that defendant only until a determination is made pursuant to the ODA. The district court held that

it did not have jurisdiction over plaintiff's claim until final administrative determination was made through either the WCA or the ODA. If the WCA claim is expired, the plaintiff must still seek to exhaust his ODA claim before he may pursue a civil claim against his employer.

This triggered a flurry of activity in Pennsylvania courts based on the ODA, with defendants requesting dismissal of Plaintiff's claims due to lack of jurisdiction by the Court of Common Pleas. These are submitted in various forms: preliminary objections for lack of subject matter jurisdiction, non-product motions for summary judgment, or just a straightforward motion to dismiss. However, all address the same issue: the plaintiff has failed to reconcile his outstanding administrative remedy.

In *Herold v. University of Pittsburgh, et al*., the plaintiff's former employer, the University of Pittsburgh appealed the denial of their non-product motion for summary judgment based the exclusivity provisions of the WCA and ODA.

Judges in Allegheny County remain unswayed by the proposition that plaintiffs must exhaust their administrative remedy under the ODA before pursuing a *Tooey* claim in civil court.

One of the issues the Commonwealth Court took issue with during the *Herold* oral argument was the fact that the plaintiff's asbestos-related illness, mesothelioma, is not specifically enumerated within the ODA and thus was not subject to the "savings clause" extending the time in which a claim is ripe under the ODA. Other diseases, like asbestosis, specifically fall within that clause and thus do not have the same time limitation before the opportunity to file a claim expires.

The Superior Court issued an opinion in *Herold* on February 23, 2023, affirming the trial court's denial of appellant's summary judgment. The court stated that while in theory the ODA remains a viable remedy to employees generally, "an occupational disease that manifests more than 4 years after an employee's last exposure to hazards causing that disease is not subject to the exclusive remedy mandate of the ODA."[3] Subsequent application for rehearing was denied.[4]

While *Herold* did not provide the defense bar the outcome they hoped, this is not the last on this issue. An appeal has been submitted to Commonwealth Court in the matter of *McHenry v. The Goodyear Tire & Rubber Company*, originally filed in the Philadelphia Court of Common Pleas. The trial court denied Goodyear Tire & Rubber Company's motion to dismiss for lack of subject matter jurisdiction. The injured plaintiff in *McHenry* has asbestosis, which poses an interesting and significant distinction from *Herold*.

The outcome of these appeals could greatly affect a former employer's liability in asbestos litigation, and we will continue to monitor for any developments in this space.

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[1] 81 A.3d 851 (Pa. 2011).

[2] No. 19-879 (W.D. Pa. March 24, 2021.

[3] *Herold v. Univ. of Pitt*., 2023 Pa. Commw. LEXIS 16 at *2 (Commw. Ct. Feb 16, 2023).

[4] *Herold v. Univ. of Pitt*., 2023 Pa. Commw. LEXIS 37 (Commw. Ct. Apr. 11, 2023).

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